

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2124

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J

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-2124

JAMES CONNELL EDEN,

Appellant

-against-

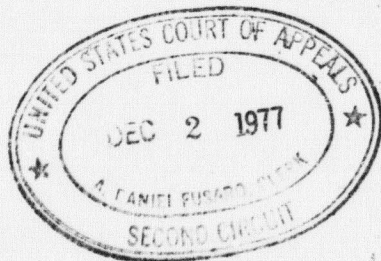
ROBERT H. KUHLMAN, Superintendent,
Woodbourne Correctional Facility,

Appellee.

On Appeal from a Judgment from the United States
District Court for the Eastern District of New York

APPELLANT'S APPENDIX

Frederick H. Cohn
Attorney for Appellant
299 Broadway
New York, N.Y. 10007
212-349-7755

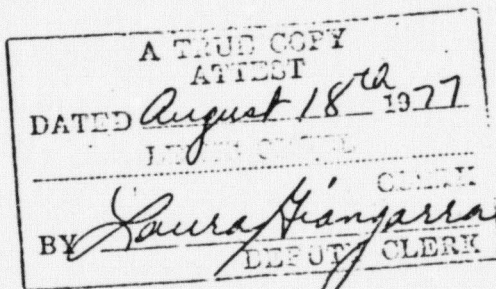


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INDEX TO APPENDIX

	<u>Page</u>
DOCKET SHEET	A-1
PETITION FOR WRIT OF HABEAS CORPUS	A-2
DISTRICT COURT OPINION	A-22
CERTIFICATE OF PROBABLE CAUSE	A-28
MEMORANDUM OPINION OF JUSTICE KERN	A-30
INDICTMENT	A-37

DATE	NR.	PROCEEDINGS
4-23-76		Petition for writ of Habeas Corpus filed. (1) (cg)
5-5-76		Letter dtd. 4-29-76 from Eden to Clerk with Clerk's reply annexed filed. (2)
6-24-76		By NEAHER, J.-ORDER TO SHOW CAUSE dtd 6-23-76 why a writ of habeas corpus should not be entered filed. Copy mailed to Atty General and copy of otsc mailed to petitioner. mg (3)
7-20-76		Letter from petitioner to Clerk re: change of address and request for counsel filed. (4)
7-22-76		By NEAHER, J.- Order dtd. 7-21-76 extending time for deft to file response papers to 8-4-76 filed. (5)
12-7-76		Affidavit in opposition to writ with transcripts of state proceedings attached filed. (6)
12/29/76		Letter to Neaheer dtd 12/20/76 re requesting an extension of time to fill out a Traverse to return form in the case. So ordered dtd 12/23/76 filed. (7)
1/19/77		Copy of affidavit of James Connell Eden filed re that he has placed under the date of Notarization of this paper true and accurate copies of same etc. (8)
1-20-77		Petitioner's traverse to return filed. (9)
7-6-77		By NEAHER, J.-Memo & Order dtd 7-5-77 dismissing the petition. mg (10)
7-7-77		JUDGMENT dtd 7-6-77 dismissing the petition filed. mg (11)
8/4/77		Application for certificate of probable cause for appeal filed. jlj (12)
8-17-77		By NEAHER, J. - Memorandum order dtd 8-16-77 granting certificate of probable cause filed. (copies mailed as directed).mm (13)



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

James Connell Eden, #65027
Full name and prison number (if any)
of Petitioner

vs.

Robert J. Henderson, Super.
Auburn Correctional Facility.
Name of Respondent

76C 755

Case No. _____
(Clerk to supply)

Petition for Writ of Habeas Corpus by
Person in State Custody

INSTRUCTIONS—READ CAREFULLY

To be considered by the District Court, this petition must be in writing (*legibly handwritten or typewritten*), signed by the petitioner and verified (*notarized*). Answers to each applicable question must be concise. If the space is too small for the answer to a particular question, finish it on the reverse side of the page or insert an additional blank page, making clear to which question the continued answer refers.

Every petition for habeas corpus must be sworn to under oath. A false statement of a material fact in the petition may be made the basis of prosecution and conviction for perjury. Petitioners should take care that their answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information that will establish whether petitioner will be unable to pay the fees and costs of the habeas corpus proceedings.

When the petition is completed, *the original and one copy* shall be mailed to the Clerk of the District Court for the Eastern District of New York.

1. Place of detention § Auburn Correctional Facility, Auburn, New York
2. Name and location of court which imposed sentence Supreme Court Of The State Of New York, County Of Kings, Criminal Term, Civic Center, Brooklyn New York, II20I
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 7349/7I
 - (b) _____
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) The date of sentence was 5/15/73 and the term of sentence was fifteen years (15).
 - (b) _____
 - (c) _____
5. Check whether a finding of guilty was made
 - (a) after a plea of guilty _____
 - (b) after a plea of not guilty ✓
 - (c) after a plea of nolo contendere _____
6. If you were found guilty after a plea of not guilty, check whether that finding was made by
 - (a) a jury ✓
 - (b) a judge without a jury _____
7. Did you appeal from the judgment of conviction or the imposition of sentence? Appealed from Judgment
8. If you answered "yes" to (7), list
 - (a) the name of each court to which you appealed:

i. New York State Supreme Court, Appellate Division, Second Dep.

ii. New York State Court Of Appeals.

iii. _____

(b) the result in each such court to which you appealed:

i. Appellate Division, Second Department affirmed conviction.

ii. Court Of Appeals denied leave to appeal

iii. _____

(c) the date of each such result:

i. Appellate Division, Second Department affirmed on 7/21/75.

ii. Court Of Appeals denied leave to appeal on 9/30/75/

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Unknown at this moment.

ii. Unknown at this moment.

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

(c)

10. State concisely all the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Denial of Petitioner's motion to dismiss the indictment or grant a hearing because of delay in prosecution deprived Petitioner of Due Process of Law and a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution.

(b) The evidence of past history of psychiatric treatment of primary witness was suppressed by the prosecution.

(c) The identification of petitioner as the perpetrator of the crime was so vague that it should have been commented upon by the Trial Judge in his charge to insure a fair deliberation of the evidence to insure a just verdict.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) The Petitioner was incarcerated at the Green Haven Correctional Facility on a Parole violation stemming from the May 7, 1971 charge. Petitioner was not apprised of this indictment until some six months later on June 2, 1972. From prison he immediately made a written request to the authorities for disposition of the case; but Petitioner was not arraigned

Con.

10.

- (d) Failure to notify the accused that the prosecution was proceeding on a presentation of "acting-in-concert" prevented an adequate defense from being presented. Such spelling subterfuge cannot comport with Due Process.

Con.

10.

- (a) ed on the charge until August 31, 1972, and did not reach trial until some seven months later on March 19, 1973. It was some twenty-one months between Petitioner's arrest and trial.

The nine months period from indictment to arraignment, the People had actual and constructive notice that the Petitioner was incarcerated on a parole violation in this State, as the record of the preliminary hearing in the Criminal Court contained a statement by the clerk that there was a New York State "parole warrant Hold" lodged against the Petitioner; and as Detective Lindqvist, the Detective in charge of the investigation, knew that Petitioner was on parole and work with parole office.

Yet despite this constructive notice, it was not until June of 1972 that Petitioner was notified of this indictment, when prison authorities delivered a communication dated May 31, 1972, from the Commissioner of Correction, this notice incorrectly citing the repealed Section 669-a of the Code of Criminal Procedure, informed the Petitioner of the untried indictment, of his right to request a final disposition and of the fact that in doing so, he would be brought to trial within 180 days of demand.

On December 13, 1972, a motion to dismiss for failure to grant a speedy trial was made, returnable January 15, 1973. The motion was on that date adjourned for the Assistant District Attorney to file answering papers. Extensive briefs were filed and oral arguments ensued on two occasions. (On March 19, 1973, Hon. Michael Kern denied the motion in a seven page memorandum. The Trial was finally begun.

The Petitioner's ability to seek out witnesses was seriously impaired and the case was actually prejudice through the twenty-one months unnecessary pre-trial delay. The case in which the Petitioner for almost ten months was unaware that prosecution continued against him; and in which, the Petitioner was unaware of the testimony of Mr. Otis Warney or the acting-in-concert theory of the prosecution.

The trial evidence further and ~~is~~ actual prejudice to the defense

II.

(a) which may have been averted by a speedy prosecution. The prosecutorial theory that Petitioner was a principal in the alleged murder - a theory followed in the Criminal Court, in the Grand Jury indictment in the Bill of Particulars, and in the Assistant District Attorney's opening statement at trial - was based on the testimony of one eyewitness to the alleged murder, Miss Linda Townsend. Miss Townsend's testimony in Criminal Court exonerated Petitioner of any stabbing. Miss Townsend also testified in the Criminal Court that Petitioner was alone with Jenkins when a second man ran from across the street to kick and punch at Jenkins. The testimony at trial of Mr. Warney contradicted this in that it allegedly placed Petitioner with the second man when the incident began. Miss Townsend's testimony of Petitioner being alone would refute any prosecution theory of acting-in-concert that was developed at trial.

Miss Townsend was actually of critical importance to the defense of the Petitioner, as her testimony exonerated Petitioner of the crime charged.

Miss Townsend's testimony at trial was replete with loss of memory and was thereby much weakened. She testified that Petitioner was with another man when Jenkins ran out. When she was reminded of her criminal court testimony, she replied, "I don't remember". She later admitted that she had a better memory of the events of May 7, 1971, at the Criminal Court hearing. She also later acceded to the view of the events as she had stated them in the Criminal Court (244-245). However, the confusion in her testimony - her inability to recall accurately events of the distant past - was obviously a detracting factor in the strength of her exoneration of Petitioner.

The Petitioner's Constitutional right to Due Process of Law was further prejudiced by the suppression of the witness, Miss Linda Townsend's psychiatric records. As in other due process non-disclosure/suppression, the pre-trial demand of the defense for the material (here made in the Discovery Motion), the negligent actions of the People with no excuse or justification, the non-revelation of the fact of Miss Townsend's psychiatric commitment, and the fact that this information was pertinent to the defense, being that Miss Townsend was the only person placing Petitioner at the scene. Counsel could have "utilized this information to prepare for trial to show Miss Townsend's inability to recognize right from wrong. It did not allow counsel any prospects of pre-trial or trial investigation of Miss Townsend's psychiatric records.

II.

- (a) The testimony of the "surprise" witness Mr. Warney was further showing of compounded prejudice by his actual testimony. Mr. Warney testified that he could not identify Petitioner. He could not recall to which police officer he had spoken. He recall being shown photographs and not identifying any individuals. The People could not produce the photographs which Mr. Warney had once been shown; nor the officer who first questioned him; and could only produce a slip of handwritten paper undated, unidentified as to the writer, and unsigned by Mr. Warney (I84-I88).

What Mr. Warney may have forgotten is unknown - it "is not always reflected in the record because what has been forgotten can rarely been shown". Mr. Warney had not been spoken to by the police since the period immediately following the crime - though he remained at the same address. He could not identify Petitioner and as the photographs shown were not produced, there was no way of ascertaining whether he at some time said Petitioner was not the man. What is known is that the delay, couple with the People's successful restraint of Mr. Warney's identity, led to unfair advantage being given.

With Miss Townsend's testimony weakened by loss of memory, and with impeachment tools against Mr. Warney unproduced, the effect of the "surprise" was devastating to Petitioner's right to Due Process of Law. It led to a completely new theory of prosecution, one unknown to and undiscoverable by the Petitioner.

In the course of Mr. Warney's testimony, the existence of a third eyewitness to the alleged events was revealed - one Mr. Ulysses Hepburn. The importance of this potential witness cannot be overlooked, for Ulysses Hepburn could have resolved the differences in the testimony of the two eyewitnesses and added other significant testimony.

It is a high probability that Mr. Hepburn would have been an asset to the defense. He could have pointed up the inability of Mr. Warney to accurately view the incident - thereby placing more credence on Miss Townsend's testimony. He could have testified to Mr. Warney being drunk; inattentive; or in line with Townsend's viewing of the crime, to the fact that the first man did not stab Jenkins, and that the second man was not with the first man when the incident began.

It was the delay in the prosecution which made finding of this important witness impossible. The defense, unaware of Mr. Warney, did not learn of the existence of Mr. Hepburn until Mr. Warney testified at trial. In a case so replete with delay - a delay which necessarily

II.

- (a) would hamper the Petitioner in locating witnesses - such surprise testimony, couple with the adamant refusal of the DA's office to provide defense counsel with information useful for seeking out witnesses, results in actual prejudice to the Petitioner.

- (b) The Petitioner's indictment referred only to Petitioner as a principal and omitted any mention of another person or the standard "acting-in-concert" language. Under the existing law this indictment was insufficient as it did not set forth the facts showing the acts or conduct of Petitioner which constituted the crime charge".

The indictment was defective, the court had no jurisdiction over the Petitioner on the acting-in-concert charge.

- Petitioner was not informed of the new theory until trial was under way due to gross negligence of the People. He was on actual notice - from the Criminal Court through indictment through the Assistant District Attorney's opening - that he
- (c) was

12. Prior to this petition have you filed with respect to this conviction.

- (a) any motion in State court for a new trial? Yes
- (b) any petition in State court for a writ of error *coram nobis* or any motion in the nature of *coram nobis*? Yes
- (c) any petitions in State or Federal courts for habeas corpus? No
- (d) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (e) any other petitions, motions or applications in this or any other court? No

II.

(b) was charged as the principal only and required to meet facts contending that he was the principal.

This deprivation of proper notice by actual notice to the contrary severely prejudice petitioner. In a case in which the "principal" theory was legally impossible to prove as no one saw the Petitioner make physical contact with the victim and the "acting-in-concert" theory was belatedly injected through weak circumstantial evidence, this "surprise" caused irreparable harm to the defense. It also destroyed ~~any~~ any prospects of trial investigation and preparation to meet and refute the new theory. Such prejudice, caused as it was from the "surprise" of the uncharged conduct, effected a violation of Petitioner's Sixth Amendment right to be informed of the charges against him.

As in other due process nondisclosure/suppression violation the pre-trial demand of the defense for the material (here made in the Bill of Particulars and Discovery Motion), the negligent actions of the People with no excuse or justification, the nonrevelation of the material until trial, and the fact that counsel could "have utilized his knowledge of the added item in preparation for trial".

The facts alleged in the Grand Jury (as well as the Criminal Court) were that Petitioner acting alone committed the homicide by stabbing Jenkins and that no other person aided him: facts adequate, if anything, only for the resulting indictment as principal. The proof allegedly adduced at trial was different - that Petitioner did not stab the deceased but joined with other person who did, though the same crime is present - different facts and a new acting-in-concert theory are alleged.

The question here is clearly not whether there were sufficient facts to support the new theory before the Grand Jury. The Jury question here is whether there were any facts before the Grand Jury to support the theory. Patently there were none, as Mr. Warney did not testify and Miss Townsend's Grand Jury testimony was the same as at Criminal Court and trial.

Despite protestations by the prosecution that all they sought was to conform the pleading to the proof, was an invalid amendment to the indictment to add a theory not presented to the Grand Jury.

But the change here was not merely in the "form" of the charge" or in an "inconsequential fact in the description of the offense".

Petitioner was thus deprived of his Fifth Amendment right to be accused by a Grand Jury; of his Sixth Amendment right to be informed

Con.

- II. (b) of the charges against him; and of his Fourteenth Amendment right to Due Process of Law. In these circumstance, the case must be reversed and the indictment dismissed.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof:

- i. A Notice of Motion was filed for an order Vacating and
- ii. _____
- iii. _____
- iv. _____

(b) the name and location of the court in which each was filed:

- i. The Notice of Motion to Vacate and Setting Aside the
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. The Notice of Motion to Vacate and Setting Aside the
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. The Motion to Vacate and Setting Aside the Judgment was
- ii. _____
- iii. _____
- iv. _____

1.
I3.

(a) Setting Aside the jury verdict, granting a new trial, on the grounds that certain events which occurred in the courtroom during the jurors deliberations and while the jurors were in the hallway, within earshot of these events, were over-heard by the jurors and affected their deliberations, to the prejudice of substantial rights of the Petitioner. This motion was in the nature of an Coram Nobis.

on.
I3.

(b) Judgment was filed in the Supreme Court of the State of New York, County of Kings, Criminal Terms, Part II.

on.
I3.

(c) Judgment was denied.

on.
I3.

(d) denied on 5/17/73.

(e) If known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. Unknown at this moment.
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

- i. Denial of a speedy trial and failure to grant Petitioner Due
- ii. Not apprisings Petitioner of the subject of the acting-in-
- iii. Variance in facts between Grand Jury and trial, effectively

(b) the proceedings in which each ground was raised:

- i. The denial of speedy trial and failure to grant Petitioner
- ii. Denial of a speedy trial and failure to grant Petitioner Due
- iii. All the issues presented in the brief to the New York State

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Evidence of past history of psychiatric treatment of primary witness was suppressed by the prosecution. It's was argued but not as the main issue. It' was argued in the Appellate Division on appeal as prejudice to Petitioner.

(b) The identification of petitioner as the perpetrator of the crime was so vague that it should have been commented upon by the trial Judge in his charge to insure a fair deliberation

(c)

Con. 16.

(b)of the evidence to insure a just verdict. The reasons why it was not presented any the lower courts is only known to my counsel, or my attorney.

17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? No for the arraignment, yes for the plea.

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? From the judgment of conviction. Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. Mr. Myron Beldock, (Beldock, Levine & Hoffman)

565 Fifth Avenue

ii. New York, New York, 10017; 490-0400

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Mr. Beldock represented Petitioner at all proceedings but the arraignment. The Court had assigned Mr. Beldock to represent Petitioner at the arraignment, but he was't present.

ii. _____

iii. _____

19. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? Yes

James C. Colen
Signature of Petitioner

STATE OF NEW YORK
COUNTY OF CAYUGA

} ss

James Connell Eden being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

James C. Colen
Signature of Petitioner

SUBSCRIBED and SWORN TO before me this

21 day of April, 1976
(month) (year)

Dorothy J. Burns
Notary Public

My commission expires

DOROTHY J. BURNS
Notary Public, State of New York
No. 1482
Qualified in Cayuga County
Commission Expires March 30, 1978

(month) (day) (year)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

James Connell Eden, #65027
Petitioner,

vs,

Robert J. Henderson, Superintendent
Auburn Correctional Facility
Respondent.

Motion For Leave To Proceed In
Forma Pauperis.

Petitioner, James Connell Eden, who is now held in a New York State Correctional Facility, asks leave to file the attached petition for writ of Habeas Corpus to the United States District Court, Eastern District of New York without prepayment of costs and to proceed in forma pauperis, and the assignment of counsel. The petitioner's affidavit in support of this petition is attached hereto.

James C. Eden
Petitioner, Pro Se

FORMA PAUPERIS AFFIDAVIT
(see instructions, page 1 of this form)

James C. Coleen
Signature of Petitioner

STATE OF NEW YORK
COUNTY OF CAYUGA

} ss

James Connell Eden, being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

James C. Coleen
Signature of Petitioner

SUBSCRIBED and SWORN TO before me this

21 day of April, 1976
(month) (year)

Dorothy J. Burns
Notary Public

My commission expires

DOROTHY J. BURNS
Notary Public, State of New York
No. 1482
Qualified in Cayuga County
Commission Expires March 30, 1978

(month) (day) (year)

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D.N.Y.

★ JUL 6 1977 ★

TIME A.M. _____
P.M. _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X-----
JAMES CONNELL EDEN, :

Petitioner, :

M' FILMED

76 C 755

against- :

ROBERT H. KUHLMAN, Superintendent:
of Woodbourne Correctional
Facility, :

MEMORANDUM
AND
ORDER

Respondent. :
-----X-----

APPEARANCES:

JAMES CONNELL EDEN,
Petitioner Pro Se

LOUIS J. LEFKOWITZ, ESQ.
Attorney General of the
State of New York
Attorney for Respondent
By JOSEPH W. HENNEBERRY, ESQ.

NEAHER, District Judge.

Petitioner seeks a writ of habeas corpus following his conviction of the crime of manslaughter in the first degree after a jury trial. He is currently incarcerated in the Woodbourne Correctional Facility under an indeterminate sentence not to exceed fifteen years. The Appellate Division,

Second Department, affirmed his conviction without opinion, 49 A.D.2d 699, 373 N.Y.S.2d 523 (2nd Dept. 1975), and leave to appeal to the Court of Appeals was denied.

Petitioner asserts four claims in his petition:

(1) denial of his right to a speedy trial, (2) suppression of evidence, (3) incomplete jury charge, and (4) lack of notice that the prosecution was proceeding on an "acting in concert" theory. Since the second and third claims were not presented to the State appellate courts, petitioner has failed to exhaust State remedies with respect to them. New York Criminal Procedure Law §440.10 provides an adequate procedure for adjudicating previously unconsidered constitutional claims. United States ex rel. Gibbs v. Zelker, 496 F.2d 991 (2 Cir. 1974). State post-conviction remedies are also available for a claim of ineffective assistance of counsel which petitioner suggests for the first time in his traverse to the Attorney General's return. These claims, therefore, must be dismissed for failure to exhaust available State remedies as required by 28 U.S.C. §2254(b).

Determination of petitioner's speedy trial claim depends on a careful assessment of four factors: (1) length

of delay, (2) reason for the delay, (3) petitioner's assertion of his right, and (4) prejudice to petitioner. Barker v. Wingo, 407 U.S. 514, 530 (1972). In the present case there was a delay of twenty-one months from arrest to trial. Since this delay is "presumptively prejudicial," the court must extend its inquiry to the three remaining factors. Id.; Wallace v. Kern, 499 F.2d 1345 (2 Cir. 1974).

Seven weeks after petitioner was arrested for murder the Criminal Court dismissed the charge at a preliminary hearing. No undue delay appears during this period, which extended from June 15 to August 6, 1971. Following the dismissal petitioner remained in prison for parole violation. Four months later, on December 6, 1971, a grand jury indicted petitioner for the same murder. This delay is excusable, for much of it was due to the recalcitrance of the principal prosecution witness.

Petitioner was not arraigned until August 31, 1972. In the State courts the prosecution attributed this nine-month period between indictment and arraignment to its "inadvertence." This was a serious error, particularly when added to the other delays in this case. Due to court congestion,

petitioner was not brought to trial until March 19, 1973. Therefore, the reasons for a substantial part of a lengthy delay are inadequate.

The third factor to be considered with respect to the speedy trial claim is also in petitioner's favor, for he timely asserted his right to a speedy trial. He was not informed of the indictment until June 2, 1972. From prison he immediately made a written request for disposition of the case. Prior to trial he also moved to dismiss the indictment on the ground that his right to a speedy trial had been violated.

The remaining consideration, whether petitioner suffered prejudice, is usually crucial. "[A]bsent a specific showing of prejudice to the defense a relatively long period of delay may be excused." Wallace v. Kern, supra, 499 F.2d at 1350.

One of the principal prosecution witnesses at trial admitted that her memory had been dulled by the passage of time. At the Criminal Court hearing she had testified that petitioner had waved a knife at the victim but had not struck

him. The Criminal Court dismissed the charge against petitioner. Petitioner now contends that, had the witness' memory been as sharp as it was at the Criminal Court hearing, the result again would have been favorable to him. The jury, however, heard the relevant portions of the Criminal Court testimony, and the witness even accepted the accuracy of the Criminal Court version when it was read to her. Petitioner thus cannot claim that he was prejudiced by the weak memory of the witness.

Petitioner's remaining allegations of prejudice are speculative and not directly related to the delays in his criminal proceedings. Therefore, in light of all the circumstances, particularly the absence of substantial prejudice, the speedy trial claim lacks merit.

Petitioner's final claim concerns the prosecution's introduction at trial of a new theory that he was "acting in concert" with another when the murder was committed. Whereas the indictment charged petitioner alone with killing the victim, midway in the trial the prosecution raised the "acting in concert" theory. Petitioner argues that this new theory was a complete surprise and that it constituted an

invalid amendment to the indictment because it had not been presented to the grand jury. New York law, however, makes no distinction between principals and accessories before the fact. N.Y. CPL §20.00. In addition, it is well established that "[o]ne indicted as a principal may be convicted on evidence showing that he merely aided and abetted." United States v. Russo, 284 F.2d 539, 540 n. 1 (2 Cir. 1960); see also United States v. Tropiano, 418 F.2d 1069, 1083 (2 Cir. 1969). Therefore, there was no constitutional violation in allowing the prosecution to proceed on the "acting in concert" theory.

Accordingly, the petition for a writ of habeas corpus is dismissed.

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of respondent dismissing the petition. The Clerk is further directed to forward a copy of this memorandum order to petitioner, Pouch #1, Woodbourne, New York 12788, and to the Attorney General of the State of New York, attention Joseph W. Henneberry, Esq.

Dated: Brooklyn, N.Y.
July 5, 1977

Edward R. Neaher
U. S. D. J.

2
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
-x-

AUG 17 1977

JAMES CONNELL EDEN,

☆ :
TIME A.M.
Petitioner, P.M.

-against-

: 76 C 755

ROBERT H. KUHLMAN, Superintendent, :
Woodbourne Correctional Facility, :

: Respondent.

-x-

MEMORANDUM ORDER

By memorandum and order dated July 5, 1977, the court denied petitioner's application for a writ of habeas corpus without a hearing, finding no violation of his constitutional rights. He now seeks a certificate of probable cause for appeal. Rule 22, F.R.A.P.

One of the issues raised in the petition concerns the fairness of his trial. Petitioner contends that the defense was surprised by the prosecution's change in theory as to his role in a homicide, pointing out that whereas the indictment charged him alone with killing the victim, the prosecution midway in trial raised an "acting in concert"

theory which apparently was the basis for his conviction. While this court ruled against petitioner on the basis of federal decisions dealing with aiding and abetting convictions, nonetheless there may be a question of constitutional significance in failing to disclose in a State indictment that a person charged with homicide may also be convicted on the theory that he was an accessory to the homicide. Accordingly, it cannot be said that the question is free from doubt. Petitioner's application for a certificate of probable cause for appeal is therefore granted.

SO ORDERED.

The Clerk is directed to forward copies of this memorandum order to petitioner, Pouch #1, Woodbourne, New York 12788, and to the Attorney General of the State of New York, attention Joseph W. Henneberry, Esq.

Edward R. Neaher

U. S. D. J.

Dated: Brooklyn, New York
August 16, 1977

SUPREME COURT

KINGS

COUNTY

TRIAL TERM PART II

PEOPLE OF THE STATE OF NEW YORK

By KERN, J.

Dated MARCH 19, 19 73

vs.

JAMES EDEN

This motion, two pronged in its attack upon delay in prosecution of criminal indictments, departs from routine in that particular stress is laid upon the claim of actual prejudice to the defendant's constitutional rights by what is contended to be inherent prejudice to such rights by virtue of inordinate delay itself. The defendant maintains that the delay is so grossly inordinate as to equate per se prejudice; moreover, that the defendant was, in fact, prejudiced in his ability to prepare to meet the charges made against him. Thus, he contends, his constitutional right to a speedy trial has been destroyed. The People, on the other hand, although acknowledging, as to one segment of time delay, a failure to act with celerity, denied guilt of such intransigence as would at once justify dismissal of the indictment; in total perspective, they deny that the defendant's due process rights have been violated or that he has suffered actual prejudice.

To lapse into the use of words with a reckless disregard of their legal connotation and application merely emphasizes the commonplace that it is most difficult to say thoughtfully what is too often said without thinking. The words "inordinate" and

BELDOCK, LEVIN & HOFFMAN ESQS
565 FIFTH AVE
N.Y., N.Y. 10017

Exhibit F. 3

"prejudice" are not to be considered on this motion, from any point of view save that in which the law has steadfastly and meticulously directed their application.

Justice Brennan, in his concurring opinion in Dickey v. Florida (358 U.S. 3), laid down what he hoped would be accepted as the broad view that inordinate delay occasioned not necessarily by prosecuting agencies but as well by any arm of the criminal justice system ought to be the compelling basis for relief.

"Thus", he states, "it may be that an accused makes out a prima facie case of denial of speedy trial by showing that his prosecution was delayed beyond the point at which a probability of prejudice arose and that he was not responsible for the delay, and by alleging that the government might reasonably have avoided it."

That so broad a doctrine did not win ready acceptance may be seen from the subsequent case of Barker v. Wingo (92 S. Ct. 2182) the court adhering to the general and well established concept that the primary burden is "on the courts and the prosecutors to assure that cases are brought to trial." It may not be said that the defendant has no burden or that, by himself occasioning or acquiescing in delay, he may not waive his right to a speedy trial; however, "the ultimate responsibility * * * must rest with the government rather than with the defendant."

The pivots upon which turn the conflicting contentions

of the parties are two periods or segments of time between August 6, 1971, when the complaint charging homicide was dismissed in the New York City Criminal Court and December 6, 1971, four months later, when an indictment was presented by the grand jury charging the defendant with the crime of murder, and that between December 6, 1971 and August 31, 1972, almost nine months later, when the defendant was arraigned in this court.

AS TO THE FIRST HIATUS

Lengthy dissertation is not necessary to absolve the prosecution from the charge of violation of the defendant's due process rights under the circumstances here disclosed. The dismissal of the complaint at the preliminary hearing ~~in~~ court was not one on the merits. In these times, it is unfortunately the rule rather than the exception that government investigations depending upon the location or the relocation of oft-recalcitrant witnesses is slow and frustrating, if not completely impossible of successful fruition. In cases such as those cited by the defendant, in which the time for prosecution for the crime charged was limited to that established in the applicable statutes of limitations, courts must consider the "primary guarantee against bringing overly stale charges." (U.S. v. Ewell, 383 U.S. 116, 86 S. Ct. 773.) Of such importance is consideration of the time element of an applicable statute of limitations that, as was said in U.S. v. Feinberg (323 F. 2d 60 [2d Cir.]) "no case has

been found holding a deliberate, unnecessary pre-arrest delay sufficient basis for reversal unless it also become unreasonable and oppressive by reason of prejudice to the accused."

In the case at bar, the People, already shorn of many prosecution safeguards, should not be held to account for a hiatus of four months after dismissal in the court of preliminary inquiry, during which period it conducted an investigation which had for its purpose uncovering evidence, if any existed, in addition to that which had been declared to be insufficient to hold the defendant for trial.

Upon this motion, as mandated in People v. Prosser (309 N.Y. 353); Pollard v. United States (352 U.S. 354); Hedgpeth v. United States (124 U.S. App. DC 291, 364 F. 2d 684), the court must consider and take into account the totality of the circumstances. The defendant may not be heard to complain that for a period of six weeks between the date of the alleged commission of the crime charged and June 15, 1971 when he was arrested, he himself avoided capture by making himself unavailable to enforcement officers charged with his apprehension. No less may he complain that after that date and prior to August 6, 1971, the date of dismissal, the People were involved in the wholly frustrating atmosphere of the judicial process, in the fulfillment of its obligation to protect the constitutional rights of the

defendant by the assignment of counsel and the continuances granted upon either the request or the consent of the defendant. The four month period of investigation by the prosecutor, after dismissal in the lower court for lack of evidence, is hardly to suffer the same condemnation which brought an end to such cases as Ross v. U.S. (121 U.S. App DC 233), and others which are clearly distinguishable. Nor may the defendant find much consolation in his argument that delay was occasioned by the People's inability to find its chief witness who had, at the preliminary hearing, bluntly and firmly informed the magistrate that she did not wish to testify against the defendant (People v. Abbatiello, 30 A D 2d 11; People v. Wright, 29 A D 2d 602; People v. DeBenedico, 61 Misc 2d 396; Barker v. Wingo, supra).

The prosecution is not at all comfortable, however, as to

THE SECOND HIATUS

The defendant, having been indicted on December 6, 1971, was not arraigned until almost nine months thereafter, that is, on August 31, 1972. The defendant was first informed and became aware of the indictment at the end of May 1972. The prosecutor wastes no time in conceding that, in this respect, he was in error. He hastens to add, however, that the failure to act with dispatch was not deliberate but was merely the result of oversight or inadvertence on the part of officialdom. The court is of the opinion that this "good-faith" error, although serious

in its reflection upon the defendant's rights, does not aspire to the point at which indictment fatality must attach. Were it shown that the prosecution's lack of diligence was deliberate or intended to impede the defendant or obstruct him in his ability to make a defense, the court would assuredly hold otherwise. The interplay of the speedy trial concept with those other fundamentals of our criminal jurisprudence which set our system apart from all others, at once reminds us that as in skating over thin ice our safety lies in our speed. However, we must give thought to what we sadly recognize as a way of life in the processing of huge and ever burgeoning criminal calendars (People v. Ganci, 27 N.Y.2d 418; People v. Franklin et al, N.Y.L.J. 2/20/73).

No little wonder indeed that in the maelstrom which inundates and engulfs every facet and arm of the so-called criminal justice system, so few lapses from propriety come to light, or that more disastrous oversights are not committed by understaffed and overworked personnel. In any event, the court is unable to find anything in this record to substantiate the defendant's contention that he was actually prejudiced in his ability to meet the issues.

He asserts that the prejudice complained of lies in (a) his inability to find and interrogate the People's witnesses, Linda Townsend and Linda Manuel, and (b) his fear that his memory as well as that of unnamed witnesses who might testify to an alibi, has been dulled by the passage of time. It is to be noted

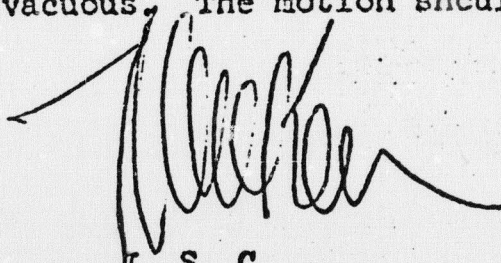
that Linda Townsend was the People's reluctant witness who practically absolved the defendant at the preliminary hearing. It is refreshing, however, to observe a defendant shedding bitter tears over what must be the district attorney's discomfiture in the disappearance of a witness without whom he cannot, in the present posture of the case, proceed, except as permitted by virtue of the particular provision of the Criminal Procedure Law which, under given circumstances, permits the use of such testimony. Nor can the defendant's lamentations over Linda Manuel be seriously considered for any purpose whatever. She saw nothing of the incident charged in the indictment; any testimony given by her would of necessity be rank hearsay as no more than repetition of what the witness Townsend had told her.

In Hodges v. United States (408 F 2d 543), the court affirmed the conviction and, relying upon U.S. v. Ewell, supra, held that:

"Here too, as in Ewell the defense claim of 'possible prejudice in defending * * * is insubstantial, speculative and premature'. There is no mention of 'specific evidence which has actually disappeared or has been lost' * * *".

See also People v. London (36 A D 2d 980).

The claimed prejudice to the defendant is specious and speculative if not completely vacuous. The motion should be and is, accordingly denied.


J. S. C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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THE PEOPLE OF THE STATE OF NEW YORK,

Indictment No.
7349/71

Plaintiffs,

-against-

JAMES EDEN,

INDICTMENT

Defendant.

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THE GRAND JURY OF THE COUNTY OF KINGS, by
this indictment, accuse the defendant of the crime of Murder
committed as follows:

The defendant, on or about May 7, 1971, in the
County of Kings, with intent to cause the death of Henry
Jenkins, Jr., caused the death of Henry Jenkins, Jr., by
stabbing him with a dangerous instrument, to wit: a sharp
instrument and thing, the exact nature of which is unknown
to the Grand Jury thereby inflicting divers wounds and
injuries upon Henry Jenkins, Jr., and thereafter and on or
about May 7, 1971 the said Henry Jenkins, Jr., died of
said wounds and injuries.

"Exhibit . 77 . . ."